GPS Terminal Services *and* Teamsters Local Union No. 776, a/w International Brotherhood of Teamsters, AFL–CIO. Case 4–CA–24834

April 16, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

On January 7, 1999, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The General Counsel, the Charging Party, and the Respondent filed exceptions with supporting briefs and answering briefs. The Respondent also filed a reply to the General Counsel's answering brief. On May 11, 2000, the Board issued its decision in *FES (A Division of Thermo Power),* 331 NLRB No. 20 (2000). On June 22, 2000, the Board issued a Notice and Invitation to File Supplemental Briefs addressing the application of *FES* to the allegations in this case. Thereafter, the General Counsel and the Respondent filed supplemental briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified and to adopt the recommended Order as modified and set forth in full below.

1. The General Counsel has excepted to the judge's decision to "sua sponte" amend the complaint. For the reasons that follow, we find merit in this exception.

The complaint issued by the General Counsel alleged, in pertinent part, that "[f]rom on or about April 12, 1996 to on or about April 15, 1996, employees of Pacific Rail Corporation established and maintained a picket line at Respondent's Harrisburg, Pennsylvania location." At the hearing, the judge and the parties agreed that this allegation was inaccurate, because the individuals who engaged in the disputed picketing included *former* employees of Pacific Rail but did not include any individuals who were, at the time of the picketing, *current* employees of Pacific Rail. During the course of the hearing, the General Counsel orally moved to amend this allegation by substituting "former employees of Pacific Rail Corporation and employees of GPS Terminal Services" for the original phrase "employees of Pacific Rail Corporation." The Respondent objected to this amendment on the grounds that it was incomplete, because the picketers also included members of the Charging Party Union who were neither current employees of the Respondent nor former employees of Pacific Rail Corporation. In order to resolve this dispute, the judge called Union President Thomas Griffith, who testified that "[t]here were former Pacific Rail employees there. There were GPS employees there, and there was also members of Teamsters Local 776 [the Union] that was there." The judge then stated that "I will deal with the issue based on the testimony, and . . . I will amend the matter or deal with the matter from the point of view of the record evidence." In his decision, the judge stated that

> [a]fter raising this issue and taking evidence to avert confusion and unnecessary complication of the record, I have sua sponte amended the complaint to reflect the credible evidence relating to this allegation, that is, that former employees of Pacific Rail, employees of the Respondent, and members of the Union established and maintained a picket line at the Respondent's Harrisburg, Pennsylvania location from on or about April 12, 1996, to on or about July [sic] 15, 1996.

[Footnote omitted.]

The General Counsel asserts that the judge erred in amending the complaint in this fashion. According to the General Counsel, the complaint was issued and prosecuted by the General Counsel and could only be amended by, or with the consent of, the General Counsel. Accordingly, the General Counsel asserts that the judge's amendment should be deemed a nullity and that the amendment proposed by the General Counsel should be

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge stated in his decision that the Union's petition in Case 4–RC–18890 to represent the Respondent's yard employees and mechanics was still pending on the date his decision issued. In fact, an election was conducted in that case, which the Union lost and on October 1, 1998, the results were certified.

[2] Although Member Walsh agrees with the judge that the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by discharging employee Floyd Wertz, he disagrees with the judge that the General Counsel failed to establish the elements of animus and knowledge. In Member Walsh's view, these elements were established by, inter alia, Supervisor Dale Baucum's angry comment to Wertz the night before Wertz' discharge that the Respondent was not going to go union, the subsequent discharge of employees Glenn Hess and Mark Mallin for their refusal to cross a picket line set up by the Union, and the timing of Wertz' discharge shortly after Baucum's outburst. Thus, Member Walsh finds that the General Counsel has met his burden of establishing that Wertz' union activities were a motivating factor in the Respondent's decision to discharge him. However, in light of the judge's decision to "credit [assistant manager] Severini's reasons for discharging" Wertz, Member Walsh finds that the Respondent has shown that it would have discharged Wertz even in the absence of his union activity. Accordingly, he joins his colleagues in the dismissal of this allegation.

granted.[3] For the reasons that follow, we agree with the General Counsel's contention.

Section 3(d) of the Act provides that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board."[4] The General Counsel's authority under Section 3(d) includes the unreviewable discretion to determine whether to dismiss an unfair labor practice charge, to issue a complaint, or to enter into a prehearing informal settlement agreement.[5] After issuing a complaint, the General Counsel has the authority to amend it, "upon such terms as may be deemed just," prior to the commencement of the hearing.[6] Once the hearing has commenced, and until the case has been transferred to the Board, the complaint may only be amended "upon motion, by the administrative law judge designated to conduct the hearing."[7] However, "[t]he authority of the Administrative Law Judge to amend the complaint under Section 10(b) of the Act is clearly limited to those instances where the amendment is sought or consented to by the General Counsel, or where evidence has been received into the record without objection."[8]

Applying these principles to the facts of this case, we find that the judge exceeded his authority by amending the complaint, consistent with the *Respondent's* request, to include the phrase "members of the Union." Plainly, this amendment was neither sought nor consented to by the General Counsel. We recognize that, as the judge found, the amendment does appear to be consistent with the record evidence concerning the identity of the picketers at the Respondent's facility. However, the Board has consistently held that a judge may not expand the complaint, over the General Counsel's objection, simply because the record evidence would support the additional allegations.[9] The courts have consistently agreed with this reading of the General Counsel's authority under Section 3(d).[10]

Although the General Counsel could have responded more specifically at the hearing to the judge's statements concerning the proposed complaint amendment, we nevertheless decline to find that the General Counsel thereby waived his right to object to the complaint amendment. The judge did not specifically rule on the General Counsel's motion at the hearing. Rather, as noted above, the judge stated that he would amend the complaint "from the point of view of the record evidence." It is not clear that the General Counsel was placed on notice, by this statement, that the judge intended to deny the General Counsel's motion to amend the complaint, much less that the judge contemplated amending the complaint in the manner proposed by the Respondent.[11]

Moreover, there is no indication in the record that amending the complaint in the manner sought by the General Counsel will in any way prejudice the rights of any party to this proceeding. Accordingly, and considering the importance in the administration of the Act of the

[3] The Respondent's answering brief to the Board does not address this issue.

[4] 29 U.S.C. § 153(d).

[5] *NLRB v. Food & Commercial Workers Local 23*, 484 U.S. 112 (1987).

[6] Sec. 102.17 of the Board's Rules and Regulations.

[7] Id.

[8] *Winn-Dixie Stores, Inc.,* 224 NLRB 1418, 1420 (1976), enfd. in pertinent part 567 F.2d 1343, 1350 (5th Cir. 1978), cert. denied 439 U.S. 985 (1978) (judge improperly amended complaint over General Counsel's objections to include surface bargaining allegation). Accord: *Laborers Local 225 (National Wrecking),* 281 NLRB 127, 129 (1986); *GTE Automatic,* 196 NLRB 902 (1972). See also *King Manor Care Center,* 308 NLRB 884, 887–890 (1992) (recognizing rule); *Penntech Papers,* 263 NLRB 264, 265 (1982), enfd. 706 F.2d 18 (1st Cir. 1983), cert. denied 464 U.S. 892 (1983) (judge erred in granting charging party's motion to amend complaint).

[9] See, e.g., *Penntech Papers,* supra (judge erroneously expanded complaint to include allegations that respondent violated Sec. 8(a)(5) by unilaterally deciding to close plant and changing employment terms, despite record evidence tending to support such claims, where the General Counsel objected to amendments to complaint); *Winn-Dixie Stores,* supra (judge erroneously amended complaint, over the General Counsel's objection, to include surface bargaining allegation, despite record evidence, adduced over the General Counsel's objections, supporting allegation).

In appropriate cases, the Board will consider on the merits alleged unfair labor practices, not specifically included in the complaint, if the issue is closely connected to the subject matter of the complaint and was fully litigated at the hearing. See, e.g., *Monroe Mfg.,* 323 NLRB 24, 26 (1997); *Pergament United Sales,* 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). However, these principles are not applicable here, as the disputed complaint allegation is an allegation of fact, not an unalleged unfair labor practice claimed to have been fully and fairly litigated. Moreover, the General Counsel has opposed expanding the complaint in this manner.

[10] See *NLRB v. Raytheon Company,* 445 F.2d 272, 274 (9th Cir. 1971), enfg. 160 NLRB 1603 (1966) ("the Board lacks authority to permit such amendments"); *Electrical, Radio Machine Workers v. NLRB,* 289 F.2d 757, 762 (D.C. Cir. 1960), enfg. in part 124 NLRB 481 (1959) ("the Board cannot entertain an amendment to the complaint which the general counsel opposes"). The D.C. Circuit specifically rejected a proposed distinction between the power to issue a complaint and the power to amend a complaint, and read the Board's 10(b) authority to amend a complaint as empowering "the Board to disallow amendments to the complaint, requested or approved by the general counsel, in order to prevent surprise or prejudice to the charged party." 289 F.2d at 761. According to the court, this interpretation of Secs. 3(d) and 10(b) was consistent with the legislative history of the Act and with judicial and prior Board decisions.

[11] We note that the General Counsel's proposed complaint language, while perhaps not as complete as the Respondent's alternative, was not itself inconsistent with the record evidence.

General Counsel's broad statutory independence under Section 3(d), the General Counsel's motion to amend the complaint is hereby granted.

2. The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) by discharging employees Glenn Hess and Mark Mallin because they refused to cross a picket line established and maintained by the Union from April 12 to 15, 1996, in protest against the Respondent's refusal to recognize the Union after taking over freight handling operations at Conrail's Harrisburg rail yard from Pacific Rail in 1996, and its failure to hire former Pacific Rail employees Frank H. Stemler IV, Barry Mutzabaugh, and Jerry Evans. For the reasons stated by the judge, we agree that Hess and Mallin's refusal to work constituted protected, concerted activity regardless of whether individuals other than Hess and Mallin were engaged in unlawful secondary picketing at the Harrisburg rail yard at that time. Accordingly, we find it unnecessary to pass on the judge's alternative finding that, if it had been necessary to make such a finding in this case, he would have found that the Union's picketing did not violate Section 8(b)(4) of the Act.[12]

The judge also found that the Respondent unlawfully refused to reinstate Hess and Mallin because of their failure to report for work during their assigned shifts. The General Counsel has excepted to any implication in the judge's decision that Hess and Mallin were required to make an unconditional offer to return to work in order to establish their entitlement to reinstatement with backpay. We find merit in this exception. The complaint alleges, and the General Counsel established, that the Respondent discharged striking employees Hess and Mallin. There was no allegation in this case that the Respondent refused to reinstate them following an unconditional offer to return to work. It is well settled that, "[w]hen strikers are unlawfully discharged, they are not required to request reinstatement since, by discharging them, the employer has signaled that he does not regard them as strikers entitled to reinstatement upon request."[13] We shall modify the judge's recommended Order and notice consistent with the foregoing principles.

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging, on or about April 16, 1996, employees Glenn Hess and Mark Mallin, because they refused to cross a picket line established by the Union, on or about April 13 and 14, 1996, the Respondent has violated Section 8(a)(3) and (1).

4. The Respondent has not violated the Act in any other way.

ORDER

The National Labor Relations Board orders that the Respondent, GPS Terminal Services, Harrisburg, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against its employees because they have engaged in concerted activity or a protected strike for their mutual aid or protection.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Glenn Hess and Mark Mallin full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

(b) Make Glenn Hess and Mark Mallin whole for any loss of earnings and other losses suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of

[12] Cf. *IBEW Local 98 (Telephone Man),* 327 NLRB 593 (1999) (union violated Sec. 8(b)(4) by continuing to picketing at neutral gate for several hours after receiving notice that a reserved gate system had been established). Accordingly, we also do not pass on the Respondent's assertion that the judge improperly excluded evidence concerning the allegedly unlawful nature of the Union's picketing, and we deny its request that the case be remanded so that the excluded evidence could be considered.

In finding a violation, Member Hurtgen notes that there was a primary picket line and another (allegedly secondary) picket line. Employees Hess and Mallin refused to cross the primary picket line. In these circumstances, Member Hurtgen agrees that it is unnecessary to decide whether the other picket line was in fact secondary and unlawful.

The judge also found that the picketing at the Harrisburg freight yard was an unfair labor practice strike from its inception. In light of the judge's findings that neither the refusal to recognize the Union nor the failure to hire Stemler, Mutzabaugh, and Evans was an unfair labor practice, however, there is no basis for the judge's conclusion that the Respondent's employees were engaged in an unfair labor practice strike. We shall modify the judge's conclusions of law, recommended Order and notice accordingly.

[13] *Naperville Ready Mix, Inc.,* 329 NLRB No. 19, slip op. at 12 (1999), enfd. 242 F.3d 744 (7th Cir. 2001). See also *Abilities & Goodwill,* 241 NLRB 27 (1979), enf. denied on other grounds 612 F.2d 6 (1st Cir. 1979). Accord: *NLRB v. Lyon & Ryan Ford,* 647 F.2d 745, 755–757 (7th Cir. 1981), cert. denied 454 U.S. 894 (1981).

Glenn Hess and Mark Mallin and, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Harrisburg, Pennsylvania, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 16, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against our employees because they have engaged in concerted activity or a protected strike for their mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Glenn Hess and Mark Mallin full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

WE WILL make Glenn Hess and Mark Mallin whole for any loss of earnings and other losses suffered as a result of the discrimination against them, with interest, less interim earnings.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Glenn Hess and Mark Mallin and, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

GPS TERMINAL SERVICES

Peter C. Verrochi, Esq., for the General Counsel.
John C. Lipps, Esq., of Houston, Texas, for the Respondent.
Ira H. Weinstock, Esq., of Harrisburg, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This case was heard before me on June 9 and 10, 1998, in Philadelphia, Pennsylvania, pursuant to an initial charge filed by Teamsters Local 776, a/w the International Brotherhood of Teamsters, AFL–CIO (the Union) against GPS Terminal Services, Inc. (the Respondent). The Union filed amended charges against the Respondent on April 15, May 10, and October 28, 1996. On April 28, 1997, the Regional Director for Region 4 issued a complaint against the Respondent.

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by terminating two of its employees because of their exercise of rights guaranteed by Section 7 of the Act; by discriminatorily discharging one of its employees because he supported and assisted the Union; the complaint also alleges that the Respondent refused to hire three applicants because of their official

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

positions (stewards) with the Union and thereby violating Section 8(a)(3) and (1).

The Respondent thereafter filed an answer denying the commission of any unfair labor practices.

PROCEDURAL ISSUES

At the hearing, the General Counsel sought to amend the complaint to include an additional violation of Section 8(a)(1). Counsel for the Respondent opposed the amendment on grounds of insufficient notice to him and lack of time to prepare a defense and advised that his objection was in the nature of a continuing one.

The proposed amendment charges that Dale Baucum, an alleged supervisor of the Respondent, told one of the Respondent's employees, Glenn Hess, in late April or early May 1996, that if he were to be rehired by the Respondent, he would not be permitted to be involved with the Union.

The General Counsel, in support of the proposed amendment, noted that on or about June 3, 1998, he sent a letter to the Respondent's counsel informing him of his intention to amend the complaint at the hearing.[1] The letter, purporting to memorialize a May 22, 1998 telephone conversation between the General Counsel and the Respondent's counsel regarding the proposed amendment, clearly relates to the proposed amendment and in point of fact is a verbatim recitation of the amendment as proposed at the hearing. At the hearing, I inquired of the Respondent's counsel whether he would desire a continuance of the hearing were I to grant the amendment request. Counsel for the Respondent indicated that the Respondent was prepared to go forward. I provisionally allowed the amendment, and evidence on this charge was adduced by both parties.

I would conclude that the amendment was proper and the Respondent has suffered no prejudice or detriment by my allowing it. Clearly, the Respondent had sufficient notice of the proposed amendment which neither factually nor legally posed any particular complexity or difficulty for purposes of mounting a defense. On this score, Hess and the Respondent's witness, Baucum, were present and testified at the hearing about this statement and, thus, the Respondent fully was able to defend against the charge. Moreover, the Respondent has dealt with the allegation in its brief and, in spite of its objection, has not made the amendment an issue therein, which indicates to me that it has acceded to the amendment in question.

Second, paragraph 5(a) of the complaint also presented a procedural issue at the hearing. While the complaint alleges that "employees of Pacific Rail Corporation established and maintained a picket line at the Respondent's Harrisburg, Pennsylvania location," the uncontroverted fact (as will be seen) is that at the time of the establishment and maintenance of the picket line on April 12–15, 1996, Pacific Rail Corporation had no connection with the facility in question. After raising this issue and taking evidence to avert confusion and unnecessary complication of the record, I have sua sponte amended the complaint to reflect the credible evidence relating to this allegation,[2] that is, that former employees of Pacific Rail, employees of the Respondent, and members of the Union established and maintained a picket line at the Respondent's Harrisburg, Pennsylvania location from on or about April 12, 1996, to on or about July 15, 1996. There was no opposition to this amendment by the parties. Accordingly, appropriate parts of the decision herein will be based where appropriate on my above-stated amendment.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs and arguments of the General Counsel, counsel for the Charging Party (Union), and counsel for the Respondent, I make the following[3]

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Pennsylvania corporation with a place of business in Harrisburg, Pennsylvania, provides intermodal truck-trailer and container loading, off-loading, and repair services for railroad carriers. During the past 12 months (i.e., April 28, 1996, through April 28, 1997), in conducting its business operations described above, the Respondent admits, and I find, that it provided services valued in excess of $50,000 for customers located outside the Commonwealth of Pennsylvania. The Respondent admits, and I find, that it is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The record establishes that at all material times, Teamsters Local 776, a/w International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE BACKGROUND FACTS[4]

Conrail, a rail carrier, has operated an intermodal rail yard facility in Harrisburg for around 30 years or more. At this facility, truck-transported trailers and containers are loaded onto and unloaded from railcars for further shipment or delivery. Over the years, Conrail has used contractors to perform the services associated with this operation. Beginning in 1962, a contractor, Pennsylvania Truck Lines (PTL), performed these services; then, in February 1992, Conrail awarded the contract to Pacific Rail Corporation (PAC Rail). On about March 6, 1996, Conrail replaced PAC Rail at the Harrisburg facility because of poor service and performance and selected the Respondent to perform the loading and unloading work, and related services.

As a general proposition, while these service providers changed, the methods, techniques, and equipment associated with the work at Harrisburg did not.

[1] See GC Exh. 2.

[2] See Tr. 271–275.

[3] Counsel for the General Counsel's motion to correct transcript is granted.

[4] Findings included in this section are based on what I have concluded are the credible testimony and other evidence of record, and the reasonable and supportable inferences drawn therefrom. To the extent these findings are at variance with other evidence herein, I have specifically discredited such other evidence.

The Union represented employees of Conrail's contractors from 1966 through March 6, 1996, when the Respondent took over the yard facilities; the Respondent, unlike its predecessors, elected not to recognize the Union.[5]

Historically, the nonclerical employees at the Harrisburg facility were divided into two categories—yard workers and mechanics. The yard workers operated large trailer loading and unloading machines called packers and small tractors called jockey wagons which were used to move containers/trailers around the yard for loading, parking, and delivery. Other yard workers served as groundmen who assisted the packer operators in guiding the trailers on and off and fastening or releasing trailers to and from the railcars. The mechanics were employed in performing service maintenance and repair work on the packers, jockey wagons, the trailers damaged in the loading process, and other equipment. Accordingly, the collective-bargaining agreement then existing between the Union and PTL and PAC Rail recognized yard workers and mechanical/maintenance employees in separate bargaining units.

The Respondent was founded in 1973 by David Anthony, its president and chief executive officer.[6] The Respondent acts as an outside vendor providing services to various rail carriers, mainly loading and unloading railcars and providing maintenance. The Respondent operates 10 such facilities for different railroads, including the Harrisburg operation; none of the Respondent's operations are unionized.

In January 1996, Conrail's representative approached the Respondent and solicited its interest in bidding on its Harrisburg rail facility's services contract. Having bid previously on Conrail contracts, Anthony was very familiar with Conrail's bid process and knew that Conrail vendors were expected to provide a certain level of consistent service in order to secure the contracts. Equally important in order to retain an awarded contract, a vendor's rates had to remain stable with no inordinate increases. According to Anthony, Conrail informed the Respondent that the operations at Harrisburg had dramatically changed with much increased train volume and the addition of stacked trains. However, according to Conrail, PAC Rail was providing generally disappointing service—late trains were a major problem—and, with the increased volume, trains simply had to get out on time. The Respondent was the successful bidder on the contract and agreed to take over the Harrisburg facility.

According to Anthony, the Respondent engaged in the intermodal rail loading and unloading business with a well-defined business philosophy which, at its core, stressed the maximization of efficiency. With respect to its employees, all workers were expected to work together as a team and be willing to be trained and even cross-trained to perform all functions necessary to attain work objectives; at Harrisburg, the main goal was to get the trains loaded and unloaded timely and efficiently. The Respondent's operating philosophy, evidently gleaned from its experience with other railroads, was predicated on its view that it was practically impossible in the intermodal business to man a facility with the correct (optional) number of packer and jockey operators without drawing on other workers, mainly mechanics and other yard personnel, to maintain efficiency and profitability. Thus, the Respondent's established personnel policies emphasized the identification of prospective employees who were not only qualified and experienced but also exhibited the ability and willingness to be trained and cross-trained to perform more than one job function. In short, prospective employees were expected to be flexible and work as a member of a team to get the job done.[7] The Respondent's policies also emphasized employee knowledge about and concern for safety (OSHA) and environmental (EPA) matters.

Prior to its award of the Conrail contract, the Respondent acquired information from various sources—including industry scuttlebutt, former PAC Rail employees, and onsite visits—about PAC Rail's history service to the shipping community. The Respondent determined that PAC Rail's problems centered largely around late trains, poor equipment maintenance, and noncompliance with environmental regulations. Anthony concluded that PAC Rail's operating philosophy and its management, based on its reputation in the industry and the condition of the actual facilities, indicated that PAC Rail's business philosophy and strategies were very much at odds with the Respondent. Moreover, Anthony also concluded that PAC Rail's failure to retain the Conrail contract was probably due to its operating philosophy, poor management, and quite possibly an unmotivated, poorly trained and deployed work force.[8]

As noted, the Respondent took over the Harrisburg operations on March 6, 1996. However beginning early February 1996, in order to man the startup, the Respondent undertook a major hiring effort, including the placement of newspaper ads and inviting all PAC Rail employees to submit applications. The Respondent formed a team of its management officials to receive and screen applications and schedule interviews of candidates. This team was comprised of Maureen Severini, an assistant manager and labor relations liaison; Tad Mahoney,

[5] On April 19, 1996, the Union filed a petition with the Regional Director for Region 4 to represent the Respondent's full-time and regular part-time yard employees and mechanics in Case 4–RC–18840. The petition, as of this writing, is still pending.

[6] As a preliminary matter, I found Anthony to be a highly credible witness generally, but especially with respect to his knowledge of the intermodal rail business and the companies he founded and operates.

[7] According to Anthony, cross-training essentially entailed the employees being instructed to perform multiple job tasks. Flexibility in this process meant that the employee should be willing to receive this training although he may not have done the new type of work before. Ideally, under Anthony's concept, a person may be hired under one job description—yardman or mechanic for example—but, with training, he should be able to work at all positions for which the Respondent had a classification. Financial rewards were built into the Respondent's policies as incentives.

[8] Anthony made a visit to the facility about 2 weeks prior to the Respondent's takeover. He observed some of the packer machines in (his words) atrocious condition and, in fact, would not buy them from PAC Rail. On this visit, Anthony also formed an "honest concern" about the PAC Rail employees, that some of the employees may have developed bad work habits. However, in spite of misgivings, he directed that all PAC Rail employees be given an opportunity to apply on the theory that there were, in all likelihood, some good workers in the group. (Tr. 36.)

general manager; Bill McConnell, safety director; Steve McGill (position unknown), and Dan Beardsley, safety manager.[9]

The Respondent's main hiring activities for purpose of the takeover took place during the period covering about February through April 9, 1996.[10] The Respondent received over 100 applications and during the startup period hired between 30 and 35 workers. Approximately 11–12 of the new hires were former PAC Rail employees and known by the Respondent's management team to be members of the Union.

IV. THE UNFAIR LABOR CHARGES

A. The Alleged Failure to Hire Frank H. Stemler IV, Jerry Evans, and Barry Mutzabaugh

The complaint charges that Stemler, Evans, and Mutzabaugh were not hired by the Respondent because of their official positions with the Union.

Stemler, Evans, and Mutzabaugh testified at the hearing.

Stemler worked for PTL and PAC Rail at the Conrail Harrisburg facility from 1962 through March 6, 1996, in various capacities, including over-the-road truckdriver, packer operator, jockey driver, and groundman. During his employment with PAC Rail, he was strictly a yard worker. Stemler held the position of union steward for the yard employees from the early 1980's through his departure date.

PAC Rail fired the regular Harrisburg terminal manager, and Stemler (by his estimate) served as a fill-in terminal manager for about 7 to 8 months (August 1995 to March 1996).

Stemler submitted an application for employment as a yard worker to Respondent on about February 28, 1996; he was called in for an interview on March 3.[11] Stemler was interviewed by Severini whom he knew as PAC Rail's (North Bergen, New Jersey) terminal manager, Mahoney, and another man whose name Stemler could not recall. According to Stemler, who wore a teamsters hat,[12] he was asked several questions by the panel regarding wages and his willingness to undergo a physical examination but could recall no questions about training or the Respondent's overall plans to manage the facility. He denied being unwilling to do certain jobs or disagreeing with anything asked by the interviewers. Stemler said that he was not offered a position by the Respondent.

Jerry Evans worked at the Harrisburg yard from May 1978 until March 1996 as a mechanic, basically maintaining and repairing equipment and machinery. He served as union steward for the mechanical employees roughly from 1980–1996 continuously, with the exception of 1 year in that period.

Evans applied on February 27, 1996, and was called in for an interview on March 3; he was interviewed by three men whose names he could not recall. Evans asked and was asked questions during the interview, including such topics as Conrail issues, health insurance, overtime, training and cross-training, which he understood meant doing maintenance (mechanical) *and* yard operations, that he would be trained in all aspects of the facility's work. As to cross-training, Evans admitted on cross-examination that he said "that's been tried," referring to an earlier experience involving one of the Conrail companies which assigned an operator to do a mechanical job with some equipment being damaged as a result. According to Evans, "[I]f you take a mechanic and put him in an operator's position, he [the mechanic] is not going to do a good job as an operator." (Tr. 199.)[13] Evans said that he was never offered a job by the Respondent.

Barry Mutzabaugh also was a long-time Harrisburg facility employee, having worked for PTL and PAC Rail from October 1977 to March 1996, basically as a yard worker, i.e., jockey driver, packer operator, groundman, etc.; he also served as a working foreman on certain jobs. Mutzabaugh became a union steward in 1979 and served in that position 16 of the 18 years he worked at Harrisburg and was a steward at the time of the Respondent's takeover.

Mutzabaugh filled out an application for a jockey, packer operator, and groundman position at the Respondent on February 28, 1996, and was interviewed on March 3, 1996, by Severini and two other persons whose names he could not recall. According to Mutzabaugh, the panel discussed his application but did not ask him about his career goals or his mechanical background,[14] nor was he told that he would be expected to perform mechanical as well as yard work. According to Mutzabaugh, he could not recall being asked about his background as a trainer of employees at PAC Rail and it was *possible* he was asked about cross-training but cannot recall. However, according to Mutzabaugh, he would not have been opposed to cross or retraining.[15] Mutzabaugh felt that the interview went well but was not offered a position.

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[9] The Respondent admits, and I find that Anthony, Severini, Mahoney, and McConnell were supervisors within the meaning of Sec. 2(11) and (13) of the Act. Anthony took no active part in the actual hiring of employees. McConnell and Beardsley were responsible for the collecting and primary screening of applications. Beardsley evidently did not participate in the actual interviews of candidates.

[10] The Respondent continued to hire yard and mechanic workers throughout 1996, but the main push for workers occurred during a period covering about a month before and about a month after startup.

[11] All applicants initially were directed by the Respondent to go to a Holiday Inn and obtain applications and fill them out there. Those selected for interview were then asked to come to another hotel where the final interview before the hiring panel took place.

[12] According to Stemler, Mahoney, on seeing his hat, remarked, "Oh, looks like you got another Bobby Cirone," who, according to Stemler, was a (Teamsters) union steward employed by PAC Rail in Carney, New Jersey. Notably, Stemler said that his hat indicated his position as steward (Tr. 209–210.) Stemler also testified that Mahoney said that he (Mahoney) really did not care one way or another if the Company was nonunion or was union. (Tr. 213.)

[13] Evans explained his answer on redirect and denied that he told the interviewer that (cross-training) was not a very good idea, but that (cross-training) had been tried before. Moreover, Evans says he told the interview that he could do everything in the yard. (Tr. 201.)

[14] Mutzabaugh testified that he has had mechanical training, having majored in auto mechanics in high school and had taken a welding course. However, he did not list any mechanical experience in his application. (See GC Exh. 8.)

[15] Mutzabaugh provided a signed affidavit to a National Labor Relations Board investigator on October 11, 1996, which speaks to this interview among other matters. Mutzabaugh avers that he wore no indicia of his union membership or steward's position and was not asked any questions about the Union. In reference to training, Mutza-

Maureen Severini testified regarding the Respondent's handling of the application of the three former stewards.

By way of background, Severini said that she currently serves as the Respondent's operating manager and has oversight responsibility for all of its intermodal rail operations; and she has been so employed for nearly 3 years. Severini also worked 18 years for PTL in various capacities, including terminal manager (Baltimore) and its East Coast liaison between the Company and the Union representing PTL employees. Severini's history with the Conrail facility at Harrisburg began during her time at PTL in the context of labor hearings in which she was involved in the early 1980s. For about 3 years, Severini was employed by PAC Rail, serving as the terminal manager of its North Bergen, New Jersey facility, which job included oversight of the PAC Rail operations at Harrisburg.

Regarding the startup at Harrisburg by the Respondent, Severini was heavily involved in establishing and implementing hiring policy and procedure and directly participated in the hiring process preparatory to the anticipated March 6 takeover. She reviewed applications, conducted interviews, and made hiring decisions.

According to Severini, PAC Rail's service at the facility was "terrible" and trains were often late. Also, because PAC Rail had cut a lot of mechanics, the machinery was in bad shape. Supervision of the employees was difficult with poor lines of communication between the facility and the railroad, due in part to the yard workers acting as managers. By contrast, Severini said that the Respondent requires supervision at every one of the facilities and requires daily communication between managers and the rail carrier. According to Severini, the Respondent insists that trains come in and out of the yard on time, and this takes more, rather than less, people to accomplish this goal.[16] Thus, to Severini, the linchpin of the Respondent's personnel policy is teamwork with all employees getting involved and its main concern was getting team players; everyone was deemed necessary to get the trains out. Cross-training and flexibility then were imperative considerations in the Respondent's plan because in times of need—e.g., backed up trains—any employee could be called on to pitch in and eliminate any bottlenecks and thereby eliminate customer complaints. Consequently, when the Respondent commenced its search for employees, it was looking for people with a particular set of attributes that went beyond that which had been called for under PAC Rail's management. It was stressed in the interviews of applicants that the Respondent expected teamwork, cross-training, and team membership.[17] Severini specifically denied that membership or holding office in the Union was a factor in the decision to hire or not hire anyone.[18]

Severini was a member of the four-person team assigned to interview applicants; she was involved in all ultimate decisions but did not sit in on all of the applicant interviews. At the interviews, the applicant basically was questioned about his experience, told the history of the Respondent, its teamwork concept, benefits, and the like. According to Severini, because the Respondent considered it absolutely necessary for employees to be willing to train and/or be retrained and cross-trained, i.e., a mechanic could be pulled to operate a jockey or a jockey operator to do some mechanic's functions, all applicants were questioned in this regard. In addition to these primary concerns, applicants were also interrogated on other categories pertaining to the position for which they applied based on the Respondent's interview evaluation summary form. Based on the panel's evaluation in each category, the applicant was given an overall score with 200 points being the maximum attainable.[19] According to Severini, no questions were asked about a candidate's union membership or any position he might hold or has held with the Union.

However, Severini knew that Stemler, Evans, and Mutzabaugh were union stewards at the Harrisburg facility by virtue of her job as a PAC Rail terminal manager which required her to visit the facility twice monthly; she was also aware that PAC Rail hires had come through the Union.

Regarding Stemler, Severini participated in his interview, after which she filled out his evaluation form in consultation with Mahoney and McConnell.[20] Stemler received a relatively low score of 63 because, according to Severini, he had been basically running the terminal and consequently did little physical work. According to Severini, the Respondent did not need a terminal manager, but needed someone to do the physical aspects of the job, e.g., climbing on rail cars. Also, Stemler was not willing to be cross-trained[21] in her view. Accordingly, he was not offered a position because he did not meet the Respondent's requirements.

As to Evans, Severini said that she was not physically present at his interview but participated in the panel discussion afterwards. The discussion of the panel included Evans' stated unwillingness to be trained, retrained, or cross-trained, for

baugh averred "they did talk to me about training and said [he] would have to qualify as far as doing it their way"; Mutzabaugh also averred, "I don't recall being asked specifically about training." (R. Exh 3.)

[16] Severini noted that PAC Rail employed no more than 20 workers in the yard and had cut its mechanics from 11 to 5 or 6.

[17] Severini testified that she also reviewed applications for experience and background of the individual.

[18] Severini was fully aware of which applicants were union members because they were former PAC Rail employees with whom she had worked.

[19] Severini initially testified that the forms were not completed during the interviews, they were completed afterward by the panel members. (Tr. 291.) On cross-examination, however, she testified that by the time of the panel's discussion, the form has been completed because of the members' filling it out while the interview was going on. Severini then changed her testimony, saying she misunderstood the General Counsel's question and testified that one person does the writing but the numbers are basically discussed by the panel members actually interviewing the candidate almost immediately after he leaves the interview room. However, the experience part of the form is filled out while the interviewee is in the room. (Tr. 317–318.) The General Counsel attacks Severini's credibility based on what he describes as her "confusing and conflicted accounts of how the forms were filled out and other errors or inconsistencies in her testimony." (GC Br. 14.)

[20] Stemler's evaluation form is contained in R. Exh. 3.

[21] The scores regarding Stemler's willingness to be trained and willingness to be retrained and cross-trained total 7 out of a possible 30 points. Although there are comments associated with training and retraining, no specific comment is recorded regarding Stemler's willingness or unwillingness to be cross-trained.

which he was graded very low.[22] However, the main discussion centered on Evans' comments to the panel that the team concept had been tried before at the Harrisburg facility and he thought it would not work there. The interviewers concluded that Evans felt that the Respondent could not create a successful team environment in Harrisburg. Thus, in spite of Evans' receiving a medium score of 95, he basically was not hired due to comments during the interview that the Respondent's plan was not going to work.

Severini personally interviewed Mutzabaugh and filled out his evaluation form.[23] In her view, Mutzabaugh was very much not team oriented, a major concern to the Respondent. Moreover, in the view of the panel, based on his responses, Mutzabaugh felt that training, retraining, and cross-training were not necessary and he received only 6 out of a possible 30 points in these categories. Severini also was not impressed with Mutzabaugh's interview demeanor, noting that he did a lot of smirking. However, while Mutzabaugh received a "medium" score of 87, his statement regarding teamwork doomed his chances for employment with the Respondent.[24]

B. The Termination of Floyd Wertz on April 11, 1996

Wertz was one of the former PAC Rail employees hired by the Respondent pursuant to its takeover of the Harrisburg yard; Wertz was a member of the Union and was an experienced yard worker.[25]

Wertz testified that he applied for a yard position with the Respondent around March 1 or 2, 1996;[26] he was not formally interviewed by the Company at that time. However, on March 6, he was contacted by telephone by a person he believed to be Severini who informed him that the Company needed packer operators and would pay $11 per hour. Wertz rejected the offer because of the pay and the Company's not employing a seniority system for purposes of work assignments. About 2 or 3 days later, he received a call from the Respondent's Larry Heckert, who again stated the Respondent's need for packer operators and that it would pay $13 per hour.[27] Wertz did not reject the offer outright but said he would think about it, mainly because of his concern about the lack of a call-in system based on seniority. Wertz received several additional calls from the Respondent and was assured that he could work as much as he desired, irrespective of the call-in system. According to Wertz, he also received more than one call from one of his former colleagues at PAC Rail—Dale Baucum—who repeated these offers.[28] On about March 10, having relented, Wertz was interviewed by Mahoney and Heckert at the Harrisburg yard for the packer position. According to Wertz, he could not recall wearing any union gear to the interview but that Mahoney began the interview with a comment that he had heard a lot about him (Wertz) and later said on the termination of the interview, that if you go union, you are going to do it the right way. Wertz responded to Mahoney's first comment and made no response to the latter because he did not know what Mahoney was talking about.[29]

Wertz was asked to start work the day after the interviews—March 11—and the Respondent temporarily waived the requirement of a physical examination.[30] Wertz started work on March 11 on the 4 a.m. shift. According to Wertz, the Company's training philosophy was not discussed, specifically training or retraining for other positions; there was no discussion about his being trained to do mechanic work nor were his career goals discussed. Furthermore, Wertz did not consider himself to be on probationary status.[31]

Wertz worked for the Respondent for about 1 month, during which time he worked both the day (4 a.m. to 4 p.m.) shift and the night (4 to 8 p.m.) shift. According to Wertz, he loaded and unloaded trains, operated the jockey wagons, and trained new employees in the operation of both the packers and jockeys, stressing track safety to them.[32]

Wertz said that while employed with the Respondent, he always wore some article of clothing, such as a baseball cap, with the Union's logo or other identifying phrase on it because the Union was trying to organize the Company. He assisted the Union in this effort by answering questions from the employees about union matters such as health and retirement benefits and wages. According to Wertz, any employee who expressed an interest was provided with a union authorization card by him.[33]

Wertz said that he was terminated by the Respondent on April 11, 1996. But prior to his discharge on April 10, he had a

[22] Evans' evaluation form is contained in R. Exh. 7.

[23] Mutzabaugh's evaluation form is contained in R. Exh. 6.

[24] According to Severini, she also recalled Mutzabaugh's talking almost exclusively about himself, that he could do everything himself. The comments of the panel in his evaluation form state "does not talk of anyone but himself one man team."

[25] Wertz worked for PTL from August 31, 1986, until February 1992, at which time he began his employment with PAC Rail. Wertz drove a truck and operated the packer machines and jockey wagons. He also served as a working foreman for PAC Rail, but was never a union steward. With the exception of driving a truck for PTL, Wertz' job duties were identical at both PTL and PAC Rail.

[26] Wertz' application (GC Exh. 12) is dated February 29, 1996.

[27] According to Wertz, Heckert called him repeatedly until he finally accepted employment with the Respondent.

[28] Dale Baucum was a former PAC Rail employee hired by the Respondent for an operator position sometime after his March 3, 1996 interview. (See GC Exh. 46.) The Respondent stipulated and agreed at the hearing that during the startup, Baucum acted as a "working supervisor" and that on June 18, 1996, he was made its terminal manager at Harrisburg. Baucum later became Wertz' night-shift immediate supervisor.

[29] At the hearing, Wertz ventured an opinion that Mahoney's first comment was based on Mahoney's having heard about him because of his honesty, willingness to work overtime, and his giving a 100-percent effort on the job. (Tr. 228.) Mahoney did not testify at the hearing.

[30] Mahoney informed Wertz that a physical would be needed eventually but evidently waived this requirement because Wertz possessed a state (or Federal) department of transportation driver's license attesting to his being physically able to drive an over-the-road truck. According to GC Exh. 45, Wertz was actually hired on March 11, 1996.

[31] Wertz testified on cross-examination that he never heard the word "probationary" in the context of his employment with the Respondent. (Tr. 239.)

[32] Wertz referred to these new workers as having been hired off the street and having no experience. (Tr. 226–228.) Wertz specifically denied ever refusing to train any employees.

[33] According to Wertz, he talked to about 10–12 workers and passed out less than six cards; and 2 or 3 workers signed them. Wertz did not testify as to the time or place that he engaged in these activities.

conversation with Baucum on the night shift in which he related his feelings about the Respondent's running of the yard. According to Wertz, he was approached by Baucum who asked him to take a ride in his truck to talk and, while parked, asked him "out of the blue" what it would take to make him (Wertz) happy. Wertz, somewhat surprised to hear that he was unhappy, nonetheless, responded and advised Baucum that he would like to have the union back (at the yard) as an insurance policy.[34] According to Wertz, Baucum angrily said that the Respondent was not going to "go" union, threw the truck in gear, and drove into the yard and went into the office without looking back or saying more. Wertz went back to work that day. The next day, Wertz reported for work and as he was about to punch in, Severini asked that the office be cleared of two other employees and requested to talk to him alone. Wertz said that Severini told him that some employees had told her that he was not happy with his job. She went on to say that if he was not happy with his job, he could not be a member of the Respondent's team. Wertz responded that he did not know why he would be unhappy because this job was the only one he ever loved or liked. According to Wertz, he then said to Severini:

> I just said to her that I know when she worked for the other companies, too, and they fired her, too, but they never fired me. And now you're firing me from here. But I said, I'm not going to lick your boots. Those are the exact words I said. I'm not licking your boots, like that guy just left this office and I know his name.[35]

According to Wertz, in discharging him, Severini did not indicate to him that he had engaged in any particular misconduct or that there were complaints lodged against him or that he had damaged company property or was insubordinate. To Wertz, his discharge was completely without warning or reason except that he was rumored to be unhappy with his job.[36]

Severini testified about the circumstances leading to the discharge of Wertz. As Wertz was punching in on April 11, she asked him to speak with her. According to Severini, she told Wertz, whom she knew as a former (PAC Rail) employee at the facility, that during the past week, six or seven employees had approached her or Mahoney with various complaints about Wertz who allegedly was telling them that he hated working at the Company and was grousing about having to train the new employees.[37] Severini said that she viewed the matter as not particularly important, more in the way of an annoyance, but an issue she, nonetheless, felt had to be addressed to avoid animosity among the workers. According to Severini, she had no intent to discipline Wertz but merely to talk to him to solve the problem, as he, to her knowledge, was adequately performing his job. Moreover, he had not complained to her about any dissatisfaction. However, when approached, Wertz responded to her with indignation and proceeded first to tell her of his love of his job of 20 or more years but that with Respondent's arrival, he hated the job and could hardly bring himself to work. Severini said that Wertz then told her that he was not going to train the "idiots" when there were people on the street with experience. Severini testified that, initially, she was not angered by this response and in an effort to get to the bottom of Wertz' feeling that the new employees would never be as good as the former ones, she allowed him to vent and made no effort to calm him down. However, Wertz engaged in a 20-minute harangue that turned vulgar, loud, and profane.[38] Wertz repeatedly stated that we[39] had people on the street who were qualified and why should she think that he wanted to train the idiots in the yard. Severini, attempting to reason with Wertz, said that she explained that the reason that the PAC Rail employees were not working was because they were not doing the job for Conrail. However, according to Severini, Wertz was inconsolable.

After a time, Severini concluded that Wertz had crossed the line and become personally disrespectful of her and insubordinate as well, behavior on principle she did not tolerate. At the end of the conversation, Severini testified that she told Wertz that since it was obvious he did not want to work for the Respondent, she was going to terminate him. Wertz responded that he did not want to work there, he hated it. Consequently, she terminated him, but not because Wertz' union membership or his wearing a union hat but because of his extreme behavior which she considered insubordinate.[40]

C. The Contentions of the Parties

The complaint charges that the Respondent refused to hire Stemler, Evans, and Mutzabaugh on or about March 3, 1996, because of their positions as union officials, that is, stewards. In support of this allegation, the General Counsel and the Union as Charging Party[41] contend that these persons were not only qualified to work for the Respondent at the Harrisburg facility, but because neither the operations and techniques of their jobs had changed in essence, they actually possessed experience and qualifications superior to most of those ultimately hired by the Respondent. Further, it is argued that all of the former stewards were indeed willing to train, retrain, or cross-train, and work

[34] Wertz did not elaborate on what he meant by the Union's being an insurance policy.

[35] Tr. 236.

[36] With noticeable hesitation, Wertz denied (stating that to his knowledge) that he ever made statements that he was unhappy working at the Company. He also denied saying that he was not going to train "idiots" when there are qualified people on the streets or that he hated watching people not knowing what they were doing when there were people with experience on the streets.

[37] On direct examination, Severini testified that she told Wertz that the employees had complained that Wertz was unwilling to train them. (Tr. 306.) On cross-examination, Severini testified that the employees did not tell her that he refused to train them but that he was complaining about having to do it. (Tr. 333.)

[38] According to Severini, Wertz resorted to swearing, saying at one point he was not training the "f—-g idiots" in the yard.

[39] The reference to "we" by Severini, I take to mean the Respondent.

[40] Severini testified that she could not remember ever being spoken to in the way Wertz did. It is noteworthy that a memorandum of the incidents, which Severini wrote and filed (see R. Exh. 8) shortly thereafter, does not specifically refer to Wertz' purportedly insubordinate and disrespectful behavior about which she testified.

[41] The arguments of the General Counsel and the Union are similar, if not identical, and in some respects overlap. Hereafter, for brevity and convenience, the positions of both will be referred to as having been advanced by the General Counsel.

flexibly as team players in the Respondent's scheme. However, the Respondent intentionally misinterpreted their responses in the interview and evaluation process and employed shifting and inconsistent standards to rate and ultimately reject them. On balance, the General Counsel contends that the Respondent had no intentions of hiring Stemler, Evans, and Mutzabaugh because it feared an imminent organizational effort by the Union and that these three as stewards would be instrumental in achieving the Union's goal to represent the facility's employees as it had for 30 or more years.[42]

With respect to Wertz, the complaint alleges that he was discharged because he supported and assisted the Union. The General Counsel argues that Wertz openly acted as a union organizer or sympathizer during the time he was employed by the Respondent; that he always wore a union cap with the Union's name and an exhortation, "join us," affixed thereon; he also passed out union authorization cards to, discussed the benefits of a union contract with, and obtained signatures from the Respondent's employees.[43] Wertz was therefore, he argues, known by the Respondent to be a union supporter. Because of his support for the Union, the General Counsel contends Wertz was targeted for discipline and/or discharge, as evidenced by Baucum's questioning him on April 10, 1996, and then being summoned to the meeting with Severini on April 11 and terminated. The General Counsel argues that Severini was generally not a credible witness and with respect to Wertz, her stated reasons for firing him are implausible, inconsistent, and hence pretextual. According to the General Counsel, her bogus reasons combined with the suspicious timing of his discharge with the Union's demand for recognition, and his activities in support thereof, support a finding that he was unlawfully terminated.

With respect to its decision not to hire Stemler, Evans, and Mutzabaugh, the Respondent contends that their applications and interviews were handled no differently than the 100 other applications it received. The Respondent submits that the entire interview and evaluation process was not only legitimate, being based on a consistent and long held business philosophy, but was also nondiscriminatory as evidenced by its hiring of 11 former PAC Rail workers known to be union members.

The Respondent submits that the three men, clearly known to be longtime employees at the Harrisburg facility and former union stewards under the PAC Rail regime, each in his own way failed to impress the interviewers who were grading them based on a written criteria on standardized forms, that he possessed the requisite attitude or mind-set to work for the Respondent. In spite of their individual skills and experience, not a singularly determinative factor under the Respondent's philosophy, they were not hired by the Respondent because they were viewed as poor candidates for employment and not because of their positions with the Union.

Moreover, the Respondent contends the General Counsel's case is fatally deficient because the record is devoid of any animus on its part against the Union or its officials and members. In fact, the Respondent asserts that union members were invited to submit applications and about one-third of them hired for the startup crew were union and, furthermore, the Union was repeatedly told by high level managers that the Respondent had no objection to union employees or union representation if the employees voted for it.

As to Wertz, the Respondent contends that in addition to having no animus against the Union, it was not even aware of Wertz' activities on behalf of the Union and, thus, could not be said to have fired him, as alleged, because he supported and assisted the Union. The Respondent contends that Wertz was fired because of his insubordinate behavior and not because of his union activities or his wearing prounion headgear.

D. Discussion and Conclusions Regarding the 8(a)(3) and (1) Charges

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. 29 U.S.C. § 158(a)(3).

Preliminary to determining whether an employer has discriminated against an employee in violation of Section 8(a)(3) or (1) of the Act, the Board has held that the General Counsel must first make a prima facie showing sufficient to support the inference that the protected activit(ies) of the employees was a "motivating factor" in the employer's decision to discipline or discharge him. If this is established, the burden shifts to the employer to demonstrate that the discipline or the discharge would have occurred irrespective of whether the employee engaged in protected activity. *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

If the reasons advanced by the employer for its action are deemed pretextual, that is, if the reasons either did not exist or were not in fact relied on, it follows that the employer has not met its burden and the inquiry logically ends. Where an employer asserts a specific reason for its action, then its defense is that of an affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of protected conduct. Thus, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place. *Kellwood Co.*, 299 NLRB 1026, 1028 (1990).

The *Wright Line* analysis is applicable not only to allegedly unlawful discharges but also refusals by an employer to hire or consider for hire applicants because of their union membership or activities. *Belfance Electric*, 319 NLRB 945 (1995); *American Signcrafters*, 319 NLRB 649 (1995); *Industrial Turn-Around Corp.*, 321 NLRB 181 (1996), and *Bat-Jac Contracting*, 320 NLRB 891 (1996).

In a refusal-to-hire case, the General Counsel must establish per *Wright Line* the following elements: (1) that each applicant

[42] The parties stipulated and agreed that on April 19, 1996, the Union filed an RC petition with the Regional Director for Region 4 to represent the PAC Rail operators (yard workers) and mechanics employed by the Respondent at Harrisburg. As will be discussed later herein, prior to that date, the Union had made known its desire for representation to the Respondent's management.

[43] The General Counsel did not call any witnesses to corroborate these activities by Wertz.

for employment[44] submitted an application for employment; (2) that the employer refused to hire or consider for hire each; (3) that the employer knew of the applicant's union status or activities; and (4) that the employer's refusal to hire or consider for hire each applicant was due to union animus. *Big E's Foodland, Inc.,* 242 NLRB 963, 968 (1979); *Clock Electric*, 323 NLRB 1226 (1997).

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge of that activity, animus, and adverse action against those involved, which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Once the General Counsel has made out a prima facie case, the burden shifts back to the employer. That burden requires a respondent "to establish its *Wright Line* defense only by a preponderance of evidence. The Respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. (Footnote omitted.)" *Merrillat Industries*, 307 NLRB 1301, 1303 (1992).

As is often the case in *Wright Line* cases, animus is or may be difficult to establish. Circumstantial evidence, according to Board law, may be relied on to infer discriminatory motivation on the employer's part. Thus, the trier of fact may look at all of the surrounding circumstances, including the timing of the employer conduct,[45] whether the employer has selectively enforced its existing or newly created policies,[46] and shifting employer explanations of policies and action[47] to prove animus.

Where an employer accelerates a discharge or layoff of an employee in close proximity to union activity, this, too, may supply evidence of unlawful motive. *IMAC Supply*, 305 NLRB 728, 736–737 (1991). *American Wire Products*, 313 NLRB 989 (1994).

An employer may not prefer to recognize a union and this, in and of itself, does not necessarily establish an animus against the union. In fact, an employer has the clear right to work nonunion as long as it does not discriminate in its hiring policies and practices. *Wireways, Inc.*, 309 NLRB 245 (1992). It must be proven that an employer acted on an antiunion feeling or attitude in failing to hire or consider for hire union adherents or discharging a union member or supporter. *Wright Line*, supra. The employer's motive, therefore, is determinative and is a precondition to finding a violation of Section 8(a)(3). *3E Co.*, 322 NLRB 1058 (1997).

Applying the foregoing principles and authorities to the case at bar, I would conclude that in not hiring Stemler, Evans, and Mutzabaugh and discharging Wertz, the Respondent did not violate the Act.

My reasons are as follows:

Of primacy is my view that the General Counsel has not established the requisite and most crucial element of animus. That is to say he has not sufficiently demonstrated that the motivating factor or reason for the Respondent's refusal to hire the stewards was because of their official union positions or support of the Union's request for recognition or, in Wertz' case, because of his activities in support of the Union. In this regard, notably, the record lacks any direct evidence of Respondent's hostility to the Union. In fact, the direct evidence speaks to the contrary, in that the Respondent, through its chief officers and managers, expressly denied employing union position or membership as a factor in hiring or not hiring. As proof, the Respondent invited all former PAC Rail employees to apply for work at the facility and, with knowledge of their union membership, did indeed hire a goodly number of the former PAC Rail workers. The Respondent also advised the Union that it had no objection to the Union's representing the employees if the employees so chose.[48] However, the General Counsel argues that the Respondent's animus is demonstrated first by the refusal to recognize the two-union bargaining units which had been in place over 30 years at the facility; the termination of two employees who refused to cross the Union's unfair labor practice picket line;[49] Baucum's "angry" response to Wertz that the Company was not going to go union; and the close timing between this remark, Wertz' organizing activities, and his discharge. Lastly, he argues that the very fact that the Respondent refused to hire the experienced stewards was part of the Respondent's "campaign" to keep the Union out. Thus, on these circumstantial grounds, the General Counsel asserts that an inference of general animus is warranted. I disagree. First, there was no legal obligation on the Respondent's part to recognize the two-unit approach of its predecessors, especially since the Respondent's approach clearly was incompatible with the historic format at the facility. However, a difference in business philosophy, in my opinion, does not redound to hostility to the Union or a desire to discourage union membership.

As to Baucum's statement to Wertz regarding the Company's unwillingness to unionize,[50] this, in and of itself, is not sufficient to convey animus against the Union, especially given the context of the remarks and the participants in the conversation. Baucum was a long-term colleague of Wertz and himself a union member while employed at PAC Rail; hence, it seems unlikely that he harbored any animosity against either Wertz or the Union. Moreover, it seems clear that Wertz had been very

[44] It is well settled that an applicant for employment is an employee within the meaning of the Act. *Briggs Mfg Co.*, 75 NLRB 569, 570 (1947); *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177 (1941).

[45] *Farm Fresh*, 301 NLRB 907 (1991); *Kellwood Co.*, 299 NLRB 1026 (1990); *Grand Rapids Press*, 325 NLRB 915 (1998); *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990); *Alson Knitting, Inc.*, 301 NLRB 758 (1991).

[46] *ABF Freight System*, 304 NLRB 585 (1991), enfd. sub nom. *Miera v. NLRB*, 982 F.2d 441 (10th Cir. 1992), affd. 510 U.S. 317 (1994).

[47] *Associated Services for the Blind*, 299 NLRB 1150 (1990).

[48] In regard to the Respondent's overall corporate attitude about the Union or union representation of its employees, I have credited Anthony's testimony. Further, I believe this attitude was conveyed to the Respondent's management along with, however, a strong and firm commitment to its over-arching corporate philosophy.

[49] This issue will be discussed in a separate section of the decision. However, suffice it to say at this juncture the two employees in question were union members hired at the very time the stewards were not hired and were terminated after Wertz was discharged.

[50] Baucum testified at the hearing but was not asked about the encounter with Wertz in his truck. Thus, I have credited Wertz as to the occurrence of the meeting, Baucum's remark, and that Baucum's response to Wertz' desire for a union at the Company was not placid.

vocal in his complaints about the Company to his fellow shift employees, and, in all likelihood, Baucum had received their complaints. Considering their long relationship, Baucum perhaps sought to speak with Wertz privately to determine what it would take to satisfy him. Wertz' response, given the Respondent's stated refusal to recognize the Union at that time, probably frustrated Baucum who knew the Company's position regarding recognition. However, an "angry" response does not animus make. It must be remembered that the Respondent, and particularly Baucum, actively recruited Wertz whose needed experience evidently outweighed his known support for the Union.[51] Thus, Baucum's response could fairly be considered one due to frustration and not hostility to the Union.

As to the timing argument, in my view, the General has not established that either Baucum or Severini knew or should have known that Wertz was engaging in organizing activities. Notably, Wertz himself did not testify that management was aware of his activities and the Respondent's witnesses, clearly aware of Wertz' union support and sympathies, did not speak to any awareness that he was attempting to organize the facility. The General Counsel assumes the Respondent's knowledge of Wertz' activities because Wertz generally always wore union headgear on the job and was known by the Respondent to be prounion. However, Wertz did not say *where* or *when* he talked to the employees about union wages and benefits or *where* or *when* he passed out cards and *where* or *when* he got them signed. For all we know, Wertz engaged in these activities somewhere other than at the facility where he could have been observed by management. Thus, since the record is devoid of evidence, either direct or circumstantial, of the Respondent's awareness of Wertz' activities at or about the time of his discharge or any other time, the inference that he was discharged because of those activities cannot be maintained.[52]

As to the General Counsel's argument that the Respondent's animus is inferable by its refusal to hire the experienced stewards as part of its campaign to keep the Union out, there is simply no evidence of any "campaign" on the Respondent's part, and its refusal to hire the stewards was adequately explained by the Respondent. This brings up my other reasons for finding no violation as to the nonhiring of the stewards and Wertz' discharge.

As applied to the three stewards, I would conclude that the Respondent's hiring process and procedures were rational, plausible, and legitimately connected to its business objectives and were implemented nondiscriminatorily. Moreover, I am satisfied with Severini's explanation of why Stemler, Mutzabaugh, and Evans were not hired which in simplest terms was that they did not measure up to the Respondent's expectations regarding flexibility, teamwork, and willingness to train or cross-train. Clearly, others did measure up as witnessed by the Respondent's hiring of Baucum, Wertz, Mallin, Hess, and seven other former union PAC Rail employees.

The General Counsel attacks Severini's credibility and asserts in essence that she was untruthful regarding the importance of teamwork and training (and may not have even covered these concerns) in the interviews of the stewards. He argues that basically Severini was inconsistent and inaccurate in her testimony, especially when compared to the more objective testimony of Mutzabaugh, Stemler, and Evans as to what was and was not asked of them and their responses. He argues that from a commonsense point of view, the responses were clearly directed to each obtaining a job with the Respondent not based on Severini's version which would result in their stupidly disqualifying themselves.

There is, of course, no way that as the trier of fact with any degree of accuracy, I can determine what actually transpired in each interview session. To be sure, I cannot with comfort venture an opinion on what questions were or were not asked, how the interviewees expressed themselves, their demeanor, their individual responses, or how they were regarded by the interviewers.

The job interview process, in spite of the best intentions to objectify it, can, nonetheless, be a very subjective exercise. A wry smile may be viewed as a smirk; unabashed enthusiasm can be viewed as overconfidence, braggadocio, or self-serving; and long experience in a job is not necessarily a positive where the enterprise ultimately fails—at least in the minds of the interviewers. Also, that the interviewee feels that the interview went well, is no guarantee that he impressed.

The three stewards each gave their version of what happened during their respective interviews; Severini provided the interviewers' version; there was little agreement between them. To a degree, each steward and Severini presented a self-serving interpretation of the interviews. In the end, the Respondent, utilizing its written criteria and the collective opinions of its interviewers, rendered to each steward a certain score—low to medium—and an opinion as to the suitability of each for employment. The stewards were not hired as a result of this process.

I believe that the three stewards were given a fair shot by the Respondent and did not make the grade, and that their union steward positions had no part in their rejection. I would dismiss the complaint as to them.[53] *J. O. Mory, Inc.*, 326 NLRB 604 (1998).

[51] The Respondent's many attempts to employ Wertz are undisputed. Furthermore, Wertz' support for the Union was certainly known by the Respondent as is evidenced by Mahoney's remark to him at the interview. Also, Wertz' initial refusal to work was based on wages and the absence of a seniority call-in system, the unmistakable signs of a union activist. It should be noted that the Respondent's hiring of a strong unionist like Wertz clearly undercuts the General Counsel's argument that the Respondent wanted to avoid union recognition by refusing to hire the stewards. If the Respondent wanted to avoid unions, hiring Wertz certainly was a mistake.

[52] I note in passing that the Respondent clearly was aware that the Union desired to represent the Harrisburg employees and had demanded recognition prior to Wertz' discharge, around March 29, 1996. My ruling goes to the Respondent's awareness of Wertz' activities.

[53] I note that aside from the meeting between Griffith and the Respondent's representatives in late March, at which Stemler and Mutzabaugh (but not Evans) were in attendance and at which hiring the stewards and recognition of the Union were raised, the record does not indicate that the stewards were directly engaged in other union-related activities.

As to the discharge of Wertz, I would credit Severini's reasons for discharging him. Here, again, what actually transpired between Wertz and Severini may never be known; however, clearly the meeting turned ugly and uncivil as indicated by Wertz' admitted remark about not licking Severini's boots and Severini's accusing him of vulgar and profane language. It seems that both parties became angry and felt disrespected which, in turn, led perhaps to harsh words and bad feelings. I believe their verbal altercation led Severini to discharge Wertz and not his union activities of which I do not believe Severini was even aware.

I note that Severini's written report regarding Wertz does not, by its terms, state that Wertz was fired for insubordination.[54] However, in most material ways, it corresponds to her testimony and clearly makes no reference to his union activities. Her failure to mention Wertz' use of vulgar language reasonably may be due to her own sensibilities and a desire not to put this aspect of their encounter in writing. On balance, I would find Wertz' discharge justifiable and would recommend dismissal of this aspect of the complaint.

E. The Discharge of Glenn Hess and Mark Mallin

1. The Union's unfair labor practice strike

As previously noted, on or about March 29, 1996, Union President Thomas Griffith requested and received a meeting with representatives of the Respondent. At the meeting,[55] Griffith introduced Stemler and Mutzabaugh who had accompanied him to Anthony and Severini and touted the stewards' experience and training capabilities and other qualifications and suggested that they be hired by the Respondent. Griffith also inquired about the Company's willingness to recognize the Union and sign a collective-bargaining agreement. Anthony, while expressing interest in possibly hiring former PAC Rail employees and inviting them to apply, indicated that the Company was not interested in recognizing the Union at that time. After this meeting, Griffith convened a meeting of the membership and reported the Company's position. He asked those in attendance to sign authorization cards for use in support of a future demand for recognition from the Company or to petition to the Board for a recognition election. On April 11, 1996, Griffith called another meeting with the membership which included the former PAC Rail and newly hired Respondent employees,[56] and announced to them that he felt the Union had achieved majority status and would be making a demand for recognition from the Respondent.

On or about April 12, Griffith delivered a letter to the Respondent informing it that a majority of the Respondent's employees had requested that the Union act as their bargaining representative, requesting recognition of the Union as the employees' sole representative, and seeking the undertaking of negotiations to arrive at a collective-bargaining agreement.[57] Griffith requested a response from the Respondent by 5 p.m. April 12. On the afternoon of April 12, Anthony called Griffith and the two discussed the demand letter at length; however, Anthony again indicated that he was not willing to recognize the Union at that time. On or about April 12 at around 5 p.m., the Union set up a picket line at the main gate of the Conrail facility; this main gate picket line continued for about 23 hours, ending at about 4 p.m. April 13, when the Union ceased entirely its picketing at the main gate. The Union's picketing activities continued, however, at a reserve gate set up by Conrail for the Respondent's employees.[58] The Union's picketing activities continued until Monday, April 15, and during this time the pickets displayed signs indicating that the Union was striking pursuant to unfair labor practices by the Respondent.

Glenn Hess and Mark Mallin testified at the hearing. Hess, a former PAC Rail yard worker, was hired by the Respondent on April 10 and was assigned the evening shift (4 p.m. to 4 a.m.) but did not have a set work schedule which was to be made on the immediately following weekend. Hess attended the union meeting on April 11 at around 2 p.m. and recalls that he was informed by Griffith that the Union was attempting to obtain a collective-bargaining contract with the Respondent; he also recalls Griffith's mentioning "some problem" with stewards not being given an equal opportunity to be hired by the Respondent. Griffith informed the membership that the Union was going to set up an unfair labor picket and advised all employee-members to report to work; and they were to finish their shift in the event the picket went up while they were on duty. Hess reported for work on April 12 at 4 p.m. and observed union pickets at around 6 p.m. at the main gate. Hess finished his shift but did not ask his supervisors about what time to report the next day. Hess received a call on Saturday between 10 a.m.–12 noon from Severini who asked if he were going to report for work as the Respondent needed workers in the yard for the evening shift. According to Hess, he told her that he had not decided whether he was going to honor the picket or report.[59] However, later, Hess decided to honor the picket and did not report to work either Saturday or Sunday and, in fact, personally participated in the picketing activities both days.[60]

[54] See R. Exh. 8.

[55] Griffith, who testified at the hearing, was of the opinion that the meeting took place in the latter part of February 1996. However, based on the credible testimony of Anthony and a corroborating letter from Board Field Attorney Donna Brown (see R. Exh. 2), I would conclude that the meeting occurred in late March 1996.

[56] At this point, as noted, the Respondent had completed its takeover of the yard and had not hired the three stewards. Griffith could not recall whether he briefed the members about their hiring status.

[57] The letter is incorporated in GC Exh. 3 and was hand-delivered by Griffith and Union Business Agent Ron Stepp to Severini at the Respondent's office in the Conrail yard.

[58] At around 10 a.m. April 13, Conrail advised Severini for the first time that a reserve gate for the Respondent's employees had been established. Griffith admitted he was told by the Conrail security police on April 12, a few hours into the Union's picketing, that a reserve gate had been set up for the Respondent's employees. However, he continued picketing at the main gate because the Respondent's employees were still using the main gate. He also sent pickets to the reserve gate. Once he was satisfied that the Respondent's employees were no longer using the main gate, he discontinued picketing the main gate on Saturday afternoon. Thus, during the first 23 hours, the Union was simultaneously picketing both gates.

[59] According to Hess, Severini did not direct him to report for work but merely asked him if he was going to report to work.

[60] Hess testified that he believed he picketed only at the gate reserved for the Respondent's employees.

On about April 16, Hess received a letter[61] from the Respondent stating that he was terminated for failing to report for work on April 13 and 14. According to Hess, he received a check for 3 days' work and called to thank Severini. In this conversation, he asked her did she think honoring the picket line was considered a voluntary quit; he believed she responded in the affirmative.

Mark Mallin, also formerly employed by PAC Rail, was hired by the Respondent on April 8[62] as a yard worker and was assigned the evening shift. Mallin also attended the union meeting on April 11 and recalled that the membership was advised by Griffith that the Union was going to demand recognition and because the Respondent had not hired the stewards previously employed by PAC Rail, the Union was going to set up an unfair labor picket at the facility. After being advised by Griffith to report to work and finish his shift in the event the picket line was up during his shift, Mallin reported for work at 4 p.m. April 12. According to Mallin, picketing commenced during his shift. He told Baucum late in his shift that if the line was up on the 13th, he probably would not report for work to which Baucum made no verbal response but merely shrugged his shoulders. According to Mallin, he did not picket over the weekend but did call the union business agent on Saturday and Sunday to check on the status of the matter. After conversing with the business agent, Mallin said that he decided to honor the line and did not report for work. On Monday, April 15, Mallin was advised that the picket was to be removed at around 12:30 p.m. and he called the Respondent at around 12:15 p.m. that day and announced to Larry Heckert that he was available for work. However, Heckert put him on hold and referred him to Baucum. According to Mallin, once he told Baucum he was available for work, Baucum advised that the Respondent had instructed him to tell all employees who had failed to report for work the past weekend that they were terminated. On or about April 16, Mallin received his termination letter from the Respondent.[63]

Severini testified about the events of April 12–15. Severini was aware of the union pickets as of around 5:30 p.m. on April 12 and was instructed by management that the Company would continue its operations. According to Severini, over the weekend, she called every employee scheduled to work and not then onsite and told each that reporting for work was mandatory and that they were required to use a gate set up especially for the Respondent's employees, not the main gate.[64]

According to Severini, she called Hess on Saturday morning and advised him that he was required to report for work and to use the neutral gate. According to Severini, Hess said that he was concerned about going through the picket line, and she offered to transport him to work in a company van from a specified parking lot.[65] According to Severini, Hess said "all right."[66] Severini also called Mallin on April 13 and advised him as she had Hess. According to Severini, Mallin expressed a "concern" about coming in. However, one of her colleagues, McConnell, was in the room at the time and personally volunteered to pick up Mallin in a company vehicle. Severini could not recall Mallin's response to her overture. Severini knew that the object of the picketing was to protest[67] the Respondent and that based on her experience in labor relations, she also was aware that members of the Teamsters will honor picket lines and not cross the line out of sympathy for the union cause in question.[68] However, according to Severini, the only employees who did not report to work that weekend were Hess and Mallin, neither of whom mentioned to her that they were not coming to work to effectuate the goals of the Union or were in solidarity with the union brotherhood. Consequently, they were terminated in short for not showing up for work and not calling in while on probationary status. After their termination, according to Severini, neither Mallin nor Hess ever contacted the Company regarding their ending their picketing and seeking reinstatement.[69]

2. Discussion and analysis

The Respondent is charged with violating Section 8(a)(1) and (3) of the Act for discharging Hess and Mallin because they refused to cross the Union's picket line and to discourage employees from engaging in protected activities.

In essence, the Respondent raises as its main defense the illegality of the Union's picketing under Section 8(b)(4)(i) and (ii)(B) of the Act as determined by the Regional Director for Region 4 on or about June 28, 1996.[70]

The Respondent contends that since the Regional Director indicated that the picketing constituted an unlawful secondary boycott, by honoring the picket line, Hess and Mallin were engaged in unprotected activity which would justify their ter-

[61] See GC Exh. 4.

[62] Mallin was not sure of his exact date of hire but claimed to have worked about 10 days for the Respondent. GC Exh. 45 indicates that he was hired on April 8, 1996. I will consider the April 8 date as his hire date.

[63] Mallin's letter is contained GC Exh. 5 and, like that of Hess, indicates that his discharge was for his failure to report to work on April 13 and 14 and his intentional disregard of a direct job requirement.

[64] Severini testified that at around 10 a.m. Saturday, Conrail told her that the Respondent's employees were not to use the main gate but the reserve gate established for them.

[65] According to Severini, a number of employees expressed their fear of possible damage to their vehicles if they crossed the picket line. Accordingly, all employees she contacted were offered transport by the Company from a parking lot near the yard before the beginning of each shift.

[66] On cross-examination, Severini changed her testimony and said that Hess told her that he would let her know (of his intentions to report or not) and she believes he did not call back. (Tr. 330–331.)

[67] Tr. 325, l. 22 indicates that the General Counsel asked Severini whether she knew that the object of the picketing was to "protect" GPS. The General Counsel moved to correct that transcript, asserting that the proper word is "protest." I agree.

[68] Severini was somewhat evasive and less than forthright in acknowledging that union members, and particularly the Teamsters with whom she had ample experience, would honor a union picket line out of sympathy for the cause. To Severini, the main concern of the Respondent's employees related to rock throwing and damage to the cars of employees who crossed the picket line.

[69] Severini acknowledged Hess' call to her thanking her for sending his last paycheck. Severini evidently had no knowledge of Mallin's conversation with Heckert and Baucum.

[70] See R. Exh. 1.

mination.[71] At the outset, then, in analyzing the Respondent's defense, it is essential to determine what effect, if any, certain allegedly unlawful picketing activities on the part of the Union have on the statutory rights of employees who honor such picketing.

It is well settled under Board law that nonstriking employees who refuse to cross a picket line make common cause with striking employees and in so doing engage in protected concerted activities as defined by Section 7 of the Act and may not be lawfully terminated for these activities. *Whayne Supply Co.*, 314 NLRB 393, 400 (1994); *Fluor Daniel, Inc.*, 311 NLRB 498, 501 (1993), enfd. 102 F.3d 818 (6th Cir. 1996); *ABS Co.*, 269 NLRB 774, 774–775 (1984); *Torrington Construction Co.*, 235 NLRB 1540, 1541 (1978); see also *American Transportation Services*, 310 NLRB 294 (1993), enfd. 15 F.3d 1079 (5th Cir. 1994) (reaffirming *ABS Co*. and extending the rationale to refusals to perform "struck work"). The employees' motivation for not crossing the picket line is irrelevant. *ABS Co.*, 269 NLRB at 775; *Limpert Bros.*, 276 NLRB 364, 380 (1985), enfd. 800 F.2d 1135 (3d Cir. 1986); *P.B.&S. Chemical Co.,* 321 NLRB 525, (1996), enfd. 121 F.3d 699 ((4th Cir. 1997).[72]

An employee assumes or acquires the legal characteristics of a striker under the Act when honoring a picket line.[73] The precise nature of the legal characteristics acquired by the employee depends, however, on the type of picketing honored by him.

For example, when employees honor a picket line established by employees of another company at a situs other than their primary or sole place of employment, an employer may discharge such employees without violating the Act if their refusal to cross such a picket line results in their failure to carry out permanent job assignments necessary for the employer to operate its business.[74] When employees refuse to cross a picket line located at their sole place of employment, on the other hand, they have stayed away from their place of employment entirely and, thus, are deemed to be engaged in a total rather than a partial work stoppage.[75] Under such circumstances, the employer will violate the Act by discharging the striking employees because the employer is not faced with any business necessity to discharge the striking employees in order to obtain replacements. Similarly, employees who refuse to cross an unfair labor practice picket line acquire the same legal characteristics as those picketing—or on whose behalf certain protesters picket—and may not be permanently replaced. See *Limpert Bros.*, 276 NLRB at 379; see also *C. K. Smith & Co.*, 227 NLRB 1061 (1977), enfd. 569 F.2d 162 (1st Cir. 1977). On the other hand, employees who honor a picket line established in clear violation of a governing no-strike provision in an operative collective-bargaining agreement are engaged in unprotected activity and may be disciplined; that the employees who honor the violative picket line are unaware of its unprotected status is irrelevant under the circumstances. *American Telephone & Telegraph Co.*, 231 NLRB 556 (1977). Further, employees who join in an unprotected strike with knowledge of its illegal aspects or as participants in an illegal "strike strategy" also remove themselves from the protection of the Act. *Pacific Telephone & Telegraph Co.*, 107 NLRB 1547, 1550–1552 (1954).

More recently, the Board made clear that honoring an unlawful picket line constitutes unprotected activity per se, and sympathy strikers need not possess knowledge of the unprotected character of the picket line for their conduct to be deemed unprotected. *Chevron U.S.A., Inc.*, 244 NLRB 1081, 1086 (1979); see also 44 NLRB Ann Rep. 97–98 (1979) (restating the holding in *Chevron*). The per se rule, however, is not entirely clear, for a Union can set up a lawful picket line at one gate and an unlawful picket line at another gate. If employees honor the unlawful picket line, then they lose the protective mantle of the Act regardless of whether or not they know of the picket line's unprotected status. On the other hand, if employees only honor the lawful picket line, then they maintain their statutory protections regardless of whatever other illegal picket lines the picketing union may set up and regardless of whether the employees know of those unlawful pickets lines. *Martel Construction, Inc.*, 311 NLRB 921, 926–927 (1993), enfd. 35 F.3d 571 (9th Cir. 1994).

Turning to the case at bar, it is abundantly clear that in the case of Hess and Mallin, both men did not report to work because they had, in differing ways, decided to honor the Union's picket line. Moreover, it seems equally clear that the Respondent was on notice of their intentions. The "concerns" raised by Hess and Mallin to Severini, I believe, based on her experience with the Union, went beyond personal safety and damage to vehicles and extended to union principle or solidarity with which she was well familiar. Also, Mallin credibly testified that he told his supervisor that if the picket was up on Saturday, he would not be reporting for work. Finally, Hess actually participated in the picketing on Saturday and Sunday, a fact which, in spite of Severini's denial, must have been known by the Respondent inasmuch as only Hess and Mallin failed to report for their shifts and clearly must have been conspicuous by their absence.

As to the picket lines, there evidently were two maintained by the Union for a time during the weekend. Hess credibly testified that he only participated in the line established at the reserve gate, and Mallin testified that he participated directly in

[71] The Respondent did not raise this defense in its answer nor at any other time before the commencement of the hearing and evidently concedes that Hess and Mallin, by not reporting for work, were honoring the picket line.

[72] Some circuit courts of appeals do not adopt the Board's position in this respect. The 4th Circuit, for instances, maintains that one who refuses to cross a picket line by reason of physical fear does not act on principle and, therefore, does not contribute to mutual aid or protection within the collective-bargaining process. According to the 4th Circuit, an employee motivated by fear should not be equated with an economic striker or afforded the protection of the Act. See, e.g., *NLRB v. Union Carbide Corp*., 440 F.2d 54 (4th Cir. 1971). Accord: e.g., *Kellogg Co. v. NLRB*, 457 F.2d 519 (6th Cir. 1972).

[73] See *G & S Transportation*, 286 NLRB 762 fn. 1 (1987) (stating that a nonstriking employee who honors a picket line takes on legal characteristics of those strikers); see also *Congoleum Industries*, 197 NLRB 534, 547 (1972) (Board precedent dictating that nonstriking employee who honors a picket line is protected regardless of motive is binding and has not been reversed by the Board or the Supreme Court).

[74] *Redwing Carriers*, 137 NLRB 1545 (1962), enfd. sub nom. *Teamsters Local 79 v. NLRB*, 325 F.2d 1011 (D.C. Cir. 1963).

[75] *Newberry Energy Corp.*, 227 NLRB 436 (1976).

neither, electing to "honor the line" in spirit as it were. Therefore, although the Union may have impermissibly set up and maintained a picket line at the neutral gate, at almost the same time it established and maintained a legal presence at the reserve gate. On the credible evidence, both Hess and Mallin, in my view, did not engage in any arguably illegal picketing at the main gate.

Martel Construction is strikingly similar to the situation created when Hess and Mallin honored the Union's picket line. In adopting the judge's Decision and Order, the Board there made particular note of the fact:

> that no evidence was introduced that either of the alleged discriminatees . . . who had refrained from entering the job site through the primary gate intended for their use, thereafter participated in any illegal secondary picketing at the neutral gate. Under these circumstances, we agree with the judge that [the alleged discriminatees'] withholding of services from their employers was lawful primary strike activity and that the protected character of their activity was not forfeited solely because, on the second day of the picketing, the Union, without the participation of Williams or Waliser, unlawfully picketed the neutral gate in addition to the primary gate. Consequently, we agree that the Respondent's contention that [the alleged discriminatees] had engaged in unprotected activity lacks merit. [311 NLRB 921.]

The Respondent attempts to distinguish *Martel* and argues that the Union here engaged from the onset in illegal picketing and that fact is determinative. However, the Respondent's point is predicated on what I believe is the Regional Director's inconclusive and perhaps erroneous finding that the Union engaged in illegal activity. Notably, the picketing began on April 12 with no reserve gate in place. Griffith testified that a few hours into the picketing he was notified by Conrail security that a reserve gate for the Respondent's employees had been set up. However, he was not convinced of this and as a precaution set up lines at both the neutral and reserve gates for a time. Significantly, Severini herself was only notified that a reserve gate had been set up at 10 a.m. on the following Saturday. Thus, under such confusing circumstances and with faulty communication, it is not crystal clear that the reserved-neutral gate system had been established. Thus, under such circumstances, a finding of illegal conduct on the Union's part is not inescapable.[76]

Moreover, to determine the legal issues in this case based on a conclusion of the Regional Director regarding an earlier charge would be to deprive the parties of their due process rights under the Act. The Board has previously stated its policy that a Regional Director's prior consideration and determination of an earlier charge serves a more limited and discretionary function than the trial-type hearing necessary under the Act and cannot serve as a replacement for the Board's adjudicative responsibility. *Warwick Caterers*, 269 NLRB 482, 483 (1984). Because the parties to this case are entitled to a full hearing and the Board is required to hear and adjudicate unfair labor complaints, the Regional Director's determination of the earlier charge is of no probative value and is not binding in any way. Id.

The Respondent also asserts an alternative defense that its termination of Hess and Mallin was based on substantial and legitimate business reasons. The Respondent argues that at the time of the startup and including the picketing period, it was experiencing serious mechanical breakdowns and staffing problems, necessitating that all employees be available for work on a 7-day schedule. Arguing further, the Respondent contends that these problems were known to Mallin and Hess and their failure to report to work on the picketing weekend, combined with their failure to make themselves available for work during the week after the picketing or to communicate with management, justifies their discharge. First, the Respondent's defense strikes a discordant tone. On the one hand, the Respondent claims a dire need for employees and yet within a 5-day period in a critical period in its operations, it discharged three experienced, evidently much sought-after employees—Wertz, Hess, and Mallin. In my view, the Respondent cannot have it both ways. Second, as I have made clear, Hess and Mallin were engaged in protected activity and on this record, I am not convinced of any business-related necessity or exigency that would warrant their discharge. Notably, according to Severini, Hess, and Mallin were the only two employees not to report for their shifts, and there was no evidence suggesting that the Respondent's operation was adversely affected by their absence. In fact, the Respondent evidently did not hire replacements for Mallin or Hess (or Wertz for that matter).[77] Accordingly, in my view, the Respondent has not convincingly established suffi-

[76] In my view, it seems reasonable that the Union arguably may have engaged in unlawful secondary picketing between the hours of 10 a.m. and 4 p.m. on Saturday, April 13, because all parties were clearly on notice of the establishment of the reserve gate and the designation of the main gate as the neutral gate. However, while a determination of the lawfulness of the 6 hours of picketing is not necessary to decide the charge relating to Mallin and Hess, it is useful to note that the Union's picketing could very well have been lawful. For the Board, in *Brown & Root USA, Inc.*, 319 NLRB 1009 (1995), held that where a union makes no effort to limit its appeal to the employees of the primary employer after separate gates are established, the inference is justifiable that the union's purpose is to cause pressure on the primary's neutral employees. Here, the Union made a reasonable effort by ceasing its picketing at the main gate after it was confident that the Respondent's employees were indeed no longer using the main gate. In cases like this one, where picketing begins before a reserve gate system is established, it is inevitable that there will be a gap between the time an employer (whether primary or secondary) claims to have established a reserve gate system and when the union decides that all of the primary's employees are in compliance with the reserve gate system and, accordingly, confines its picketing to the new primary gate. To be sure, this gap is not limitless, but rather should reflect, on practical grounds, a reasonable amount of time necessary for a union to confirm complete compliance by the employees of the primary employer. In any event, to me, 6 hours is reasonable. Had it been necessary to make such a determination in this case, I would have found the Union did not violate Sec. 8(b)(4) of the Act.

[77] The evident failure to show that it hired replacements specifically for Hess and Mallin further erodes the Respondent's claim of business necessity. I note, however, that the Respondent evidently hired two other yard workers in April. Richard Aikens and Jamie Suhr were both hired on April 22; however, it was not represented by the Respondent that these were replacements for Hess and Mallin. (See GC Exh. 45.)

cient business-related necessity that would warrant Hess' and Mallin's discharge. *Newberry Energy Corp.*, 227 NLRB at 437.

Lastly, the Respondent, citing *Rapid Armored Truck Corp.*, 287 NLRB 371 (1986), contends that Hess and Mallin failed to contact it and offer to return to work on April 15, the Monday after the picketing ceased and, therefore, are not entitled to reinstatement. First, Hess credibly testified that he called Severini, certainly to thank her for the severance check but also to inquire of her whether his honoring the picket was considered a voluntary quit. Irrespective of Severini's answer, this to me clearly indicates Hess' interest in returning to his job. For his part, Mallin credibly testified that he called the Respondent to announce his availability for work but was told by Baucum in so many words his employment was terminated. Also, it is significant to note that both had received termination letters very close in time to the cessation of the picketing. Significantly, *Rapid Armored Truck* clearly states that the Board does not require the performance of futile acts such as, in my view, making an offer to return to work after being officially notified of termination. There is no dispute that the Respondent discharged Hess and Mallin, and any attempts they made or might have made to be reinstated, in my view, were or would have been unfavorably received by the Respondent. Thus, under these circumstances, I would conclude that both Hess and Mallin satisfied the requirement of making an unconditional offer to return to work but were rebuffed by the Respondent's agents.

Based on the foregoing, I would find and conclude that the General Counsel has established that the Respondent violated Section 8(a)(1) and (3) of the Act in discharging Hess and Mallin because they honored the Union's legitimate lawful unfair labor practice picket line, a right guaranteed them under the Act and in not reinstating them because of their failure to report for work during their assigned shifts.

F. The Alleged 8(a)(1) Violation by the Respondent's Supervisor, Dale Baucum

The amended complaint charges that in a telephone conversation with Hess in late April or early May 1996, Baucum, among other things, stated that Hess might be rehired by the Respondent if he were to sever his relationship or disassociate with the Union.

Hess was the General Counsel's only witness for this alleged conversation. According to Hess, about 2 weeks after he was discharged, Baucum called him at home and advised that he was considering putting together a special three-man crew to work only the container part of the yard and solicited his interest in coming back to work. Referring to his termination letter, Hess advised Baucum that he felt that the Company would probably not want him back. According to Hess, Baucum said that he would speak to management but admonished that if Hess were rehired, he probably would have to sever any connection with the Union. Baucum promised to get back with Hess with the results of his discussions with management.

Baucum testified about his conversation with Hess. According to Baucum, he and Hess were fairly good "work" friends and he merely called to ask after him and the conversation lasted but a few minutes. Baucum denied any discussion of Hess' returning to work for the Respondent and that the Union did not come up in any way during the conversation. He specifically denied conditioning Hess' rehire on his not being involved with the Union. In fact, according to Baucum, Hess advised him that he had applied for work at a Federal defense facility and was considering opening up a small engine repair shop.[78]

There is no real issue[79] as to Baucum's supervisory status with the Respondent. In my view, if Baucum indeed made the remarks attributed to him, there would be a clear violation of Section 8(a)(1) as there could be little doubt that such remarks, it reasonably may be said, would tend to interfere with Hess' exercise of the rights guaranteed employees under the Act. *Williamhouse of California, Inc.*, 317 NLRB 699 (1995); *Honda of Hayward*, 307 NLRB 340, 349 (1992); *Bridgeway Oldsmobile*, 281 NLRB 1246 (1986).

The crucial issue is whether Baucum made the remarks. I have concluded that he did not. My reasons are as follows.

First, as pointed out by the Respondent's counsel, during cross-examination, Hess admitted that the affidavit he provided to the Board's investigators on May 20, 1996, contained no references to the conversation with Baucum about his rehire or union activity. In my mind, this is not something that would escape one's memory, so close in time to the events at issue, and especially given the nature of the charge and Hess' involvement in the alleged unfair labor practice. Thus, Hess' testimony seems to lend itself to a charge of recent fabrication. Then there are the remarks themselves. Beyond any doubt, Baucum seemed to have enthusiastically embraced the Respondent's operating philosophy, which clearly did not include a return to specialization of job functions in the yard. Thus, it seems highly incongruous of Baucum to enlist Hess to participate in a crew that was to perform a specialized function at the yard. Accordingly, Baucum's denial seems more plausible, and I credit his denial. I would recommend dismissal of this aspect of the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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[78] Hess confirmed that in his conversation with Baucum, he told Baucum that he had applied for another job, that he was going to get a job with a Federal defense contractor.

[79] In its answer, the Respondent initially denied Baucum's supervisory status. As noted earlier, at the beginning of the hearing, the Respondent conceded by stipulation that Baucum was a so-called working supervisor. Sec. 2(11) of the Act reads as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Baucum clearly had and exercised many, if not all, of these powers and needs to possess only one to be embued with supervisory authority. *CTI Alaska Inc.*, 326 NLRB 1121 (1998).

3. The picketing of the Respondent which commenced on April 12, 1996, was an unfair labor practice strike at its inception.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by discharging employees Glenn Hess and Mark Mallin on April 16, 1996, for refusing to cross the Union's picket line on April 13 and 14, 1996, and since the date of their discharge, failing or refusing to reinstate them to their former or substantially equivalent positions of employment, although Hess and Mallin had attempted to make and, in effect, made unconditional offers to return to work.

5. The Respondent did not violate the Act in any other way.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I have concluded that the Respondent unlawfully discharged employees Glenn Hess and Mark Mallin. I shall recommend that it be ordered to offer them full and immediate reinstatement to their former jobs or if, for lawful reasons, those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights or privileges previously enjoyed, discharging if necessary any replacements, and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of their unconditional offer to return to work to the date of proper offers of reinstatement, less any interim earnings as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]